

REPORT DOCUMENTATION PAGE			<i>Form Approved</i> <i>OMB No. 0704-0188</i>		
<small>Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.</small>					
1. REPORT DATE (DD-MM-YYYY) 22-10-2009		2. REPORT TYPE FINAL		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE Closing the Gaps: Why Changes are Needed in Law and Policy to Improve Homeland Security		5a. CONTRACT NUMBER			
		5b. GRANT NUMBER			
		5c. PROGRAM ELEMENT NUMBER			
6. AUTHOR(S) CAPT Scott A. Minium Paper Advisor: CDR Dan Crouch		5d. PROJECT NUMBER			
		5e. TASK NUMBER			
		5f. WORK UNIT NUMBER			
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Military Operations Department Naval War College 686 Cushing Road Newport, RI 02841-1207		8. PERFORMING ORGANIZATION REPORT NUMBER			
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM(S)			
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)			
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution Statement A: Approved for public release; Distribution is unlimited.					
13. SUPPLEMENTARY NOTES A paper submitted to the Naval War College faculty in partial satisfaction of the requirements of the Joint Military Operations Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.					
14. ABSTRACT In the last twenty to thirty years the threat to the United States has grown from straightforward state actors to include the less well defined threats posed by terrorists. The most likely threat of violence to the US homeland is not from an organized military operation but from terrorists. Historically, terrorist threats have been addressed by law enforcement agencies. Meeting this threat as from the US as possible means using the military, and since the threat is likely to be terrorist in nature, it follows that combating it will require at least some law enforcement actions. However, current laws and policies preclude many such actions by the military, thus opening gaps in our defense. that could be exploited, deliberately or fortuitously, by our enemies. These gaps must be closed if US Northern Command, as the DoD component charged with assisting in homeland security, is to be successful in its homeland security role. <i>To accomplish this, the Posse Comitatus Act and DODD 5525.5 should be thoroughly revised.</i>					
15. SUBJECT TERMS Posse Comitatus, Maritime Security, NORTHCOM, Military Support for Civilian Law Enforcement					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 28	19a. NAME OF RESPONSIBLE PERSON Chairman, JMO Dept
a. REPORT UNCLASSIFIED	b. ABSTRACT UNCLASSIFIED	c. THIS PAGE UNCLASSIFIED			19b. TELEPHONE NUMBER (include area code) 401-841-3556

**NAVAL WAR COLLEGE
Newport, R.I.**

**Closing the Gaps:
Why Changes are Needed in Law and Policy to Improve Homeland Security**

by

Scott A. Minium

Captain, US Navy

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Contents

Introduction	1
Legal Restrictions and Authorities	1
DoD Implementation of Chapter 18 and the PCA	6
Maritime Security Strategy Issues	7
Perspective: Past Events	10
Perspective: A Possible Future	12
Conclusions	14
Recommendations	16

Abstract

In the last twenty to thirty years the threat to the United States has grown from straightforward state actors to include the less well defined threats posed by terrorists. The most likely threat of violence to the US homeland is not from an organized military operation, but from terrorists. Historically, terrorist threats have been addressed by law enforcement agencies. Meeting this threat as from the US as possible means using the military, and since the threat is likely to be terrorist in nature, it follows that combating it will require at least some law enforcement actions. However, current laws and policies preclude many such actions by the military, thus opening gaps in our defense. that could be exploited, deliberately or fortuitously, by our enemies.

These gaps must be closed if US Northern Command, as the DoD component charged with assisting in homeland security, is to be successful in its homeland security role. To accomplish this, the Posse Comitatus Act and DODD 5525.5 should be thoroughly revised.

Introduction

In the last twenty to thirty years the threat to the United States has grown from straightforward state actors to include the less well defined threats posed by terrorists. The US is determined to meet these threats with a defense in depth; trying to meet a threat as far as possible from the homeland. The US plan to counter this threat involves the Department of Homeland Security (DHS) and Department of Defense (DoD). Within DoD, Commander, US Northern Command (NORTHCOM) is charged with partnering with DHS to provide a layered defense.¹

For the foreseeable future, the most likely threat of violence to the US homeland is not from an organized military operation, but from terrorists. Historically, terrorist threats have been addressed predominantly, if not exclusively, by law enforcement agencies. Meeting this threat as far from the US as possible means using the military², and since the threat is likely to be terrorist in nature, it follows that combating it will require at least some law enforcement actions. However, current laws and policies preclude many such actions by the military, thus opening gaps in our defense that could be exploited, deliberately or fortuitously, by our enemies.

Unless and until the laws and directives governing the law enforcement authority of the US military are revised and clarified, NORTHCOM will be hampered in its homeland security role.³

Legal Restrictions and Authorities

The gaps in our layered defense originate first and foremost from the interpretation and implementation of US law. There are a number of laws that regulate the law enforcement role of the military. These laws include, but are not limited to: the US

Constitution, the Insurrection Act, the Posse Comitatus Act, and the Military Support to Law Enforcement Act.

The Constitution grants authority over the military to Congress and the President. The Constitution names the President as Commander in Chief of the military; including the State militia when called into Federal service.⁴ Congress is given the power to call up the militia to “execute the Laws of the Union, [and] suppress Insurrections and repel Invasions.”⁵ This authority of the Federal government applies to the state militia (now known most everywhere as the National Guard) only when it has been called into Federal service. However, when employed at the State level by a Governor, members of the National Guard can and have been used in many capacities including law enforcement.

Although the Congress is given the power to use the military to suppress insurrections, in 1795 Congress conveyed this authority to the President under the Insurrection Act.⁶ Modified several times since, this law allows the military to be used by the President in a wide variety of circumstances which include restoration of order after natural disasters, terrorist acts and civil disturbances. However, in giving the President this authority, Congress also took action to check potential abuses of this power by the Executive. One of these checks is that in nearly every circumstance covered by the act, the legislature or Governor of the State must first request Federal assistance. In other words the Federal government must be invited to enter the State. A notable exception to the invitation rule, however, is that the President can take action in cases of denial of civil rights or when the degree of the problem is beyond State capabilities. The final requirement to be met prior to use of the military under the act is for the President to issue a 'proclamation to disperse.'⁷ Of

note, use of the military under the Insurrection Act is commonly referred to as the imposition of “martial law” even though those words do not appear in the Constitution or the act.

The history of the military in law enforcement dates to the early days of the republic when President Washington, using his authority as Commander in Chief, took command of the Army and used it to suppress the Whiskey Rebellion in 1794.⁸ Use of the military to support law enforcement continued through the 1800s. The practice of using the Army to assist law enforcement became fairly common as local sheriffs and marshals pressed the Army into service as a posse comitatus (literally, 'power of the land').⁹ This practice was widespread but was not called into question at the Federal level until well after the Civil War. During the Reconstruction Era (1865-1877), the South was essentially ruled by military governors who used the military for law enforcement when needed.¹⁰ The practice of local law enforcement calling the military into service increased in breadth and scope as Reconstruction progressed. The action that finally precipitated change came in 1876 when military personnel were stationed at polling places during the Presidential election. The results of that election were hotly contested, and part of the dispute was based on the idea that the military presence had influenced the voters.¹¹ Since the Constitution had, and has, no prohibitions on the use of the military for law enforcement, Congressional action was necessary to close a loophole that was being exploited. Enacted in 1878, the Posse Comitatus Act (PCA) was intended to largely stop the use of the military in a law enforcement role. It is mentioned so frequently in discourse about the military and law enforcement that one could come to believe it to be the sole law of its kind. The full text of this law is as follows:

Whoever, except in cases and under circumstances expressly authorized by the

Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹²

There are two phrases in the law that merit attention. The first is “the Army or the Air Force.” The act only applies to the Army (and the Air Force since 1947) even though there was debate at the time to have it apply to the Navy as well.¹³ The second phrase of interest is “execute the laws.” In promulgating its view on this part of the law, DoD has relied on a small number of court cases and internal interpretation of the law.¹⁴ DoD implementation of this law will be discussed in detail later.

The last law of specific interest to this study is “Military Support for Civilian Law Enforcement Agencies.”¹⁵ This law, found in Chapter 18 of Title 10, was enacted in the 1980s in an effort to use military capabilities to slow the flow of drugs into the US. Of note, most of the law does not have geographic boundaries and thus the military restrictions within it apply globally. Referred to hereinafter as Chapter 18, this law is composed of several sections, the more salient of which are summarized below. (all emphasis added)

Sec. 371 allows for information obtained during normal military operations to be turned over to civilian law enforcement.

Sec. 372 allows the the use of military *equipment* by civilian law enforcement.

Sec. 374 broadly allows the military (at the request and in support of a Federal agency) to *operate* equipment for the purposes of: detecting and monitoring air and sea traffic, intercept and direction of aircraft and vessels *outside* the land area of the US, and for enforcement of domestic or foreign terrorism laws, and immigration law.

Sec. 375 bars the military from direct participation in “search, seizure, arrest, or other similar activity...*under this chapter.*”

Sec. 379 requires the assignment of US Coast Guard (USCG) personnel to Navy ships at sea in “drug interdiction areas” to exercise law enforcement authority. These detachments are known as legal detachments or LEDETs.

DoD provides internal guidance for the implementation of these laws through Department of Defense Directives (DODD). There are two directives closely linked to military law enforcement activities.

The first, DODD 3025.12, “*Military Assistance for Civil Disturbances (MACDIS)*,” primarily provides guidance related to tasking from the President in the event the Insurrection Act is invoked. One specific point of interest in this directive is the granting of “Emergency Authority.” The wording varies slightly amongst various directives, but the general intent is to allow a military commander to use forces in an emergency, “to prevent loss of life or wanton destruction of property, or to restore governmental functioning and public order,” and when there is no time to consult higher authority.¹⁶

The second directive of note is DODD 5525.5, “*DoD Cooperation with Civilian Law Enforcement Officials.*” This directive serves two purposes. First, it is within this directive that DoD gives its interpretation of the limits imposed by the PCA. For example, the directive prohibits: interdiction of a vessel or aircraft, surveillance or pursuit, and personnel acting as undercover agents, investigators or interrogators.¹⁷ The second purpose is implementation of Chapter 18. In some cases, specific points of law are stressed, for example the notion that while the law allows the military to take civilian law enforcement into account when planning training missions, it is wrong to create missions solely for such

purposes. Arguably, it is DoD implementation of Chapter 18 that has had the largest impact on military involvement with law enforcement.

DoD Implementation of Chapter 18 and the PCA

A casual comparison of DODD 5525.5 and Chapter 18 show them to be very similar in wording. A closer reading, however, indicates that DoD strayed far from the original words of the law. In fact, numerous restrictions to military support for law enforcement stem entirely from this directive and not from the law.

Sec. 375 of Chapter 18 states that the military cannot conduct “search, seizure, arrest, or other similar activity...under this chapter.” As written, the law thus prohibits these types of actions *only* when the military is operating in support of civilian law enforcement *under* Chapter 18. In implementing these restrictions, however, DoD went considerably further. The portion of interest reads:

E4.1.3. Restrictions on Direct Assistance. Except as otherwise provided in this enclosure, the prohibition on the use of military personnel “as a posse comitatus or otherwise to execute the laws” prohibits the following forms of direct assistance:

E4.1.3.1. Interdiction of a vehicle, vessel, aircraft, or other similar activity.

E4.1.3.2. A search or seizure.

E4.1.3.3. An arrest, apprehension, stop and frisk, or similar activity.

E4.1.3.4. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.¹⁸

This part of the directive has a number of wide reaching effects. First, it defines the types of activities prohibited by the PCA using the language of Chapter 18. However, the additional restrictions found in Chapter 18, and included in the DODD as quoted above as paragraphs 1-4, were not intended to apply outside of the activities defined by Chapter 18. With this directive, DoD widened the application of the PCA to include the entire world unless specific exemptions were granted by the Secretary on a case basis.¹⁹ This remains the

case even though legal opinions have generally held the PCA restrictions apply only within the US.²⁰ For NORTHCOM, charged with security of waters out to 500 miles from the US coastline, this means that efforts to meet the enemy further from shore may be frustrated because any activity that looks like law enforcement, like stopping a suspect ship, could be prohibited. Finally, one additional authority granted under Chapter 18, the ability of “military personnel operating aircraft or ships to interdict, query and direct suspect aircraft and ships, outside the US, to destinations provided by law enforcement,” was effectively removed by DoD through this directive.²¹

Maritime Security Strategy Issues

Issued in 2005, the National Strategy for Maritime Security describes how the US will organize to extend a defense in depth into the maritime domain. The strategy calls for coordination protocols and direct interaction, and specifically names the DHS and DoD as the lead agencies. As discussed previously, NORTHCOM is the DoD interface with law enforcement, so any Joint Task Force established to work with DHS will be under NORTHCOM. The strategy requires cooperation between the military and law enforcement, and in the post 9/11 environment, it is not surprising to see a focus on interagency cooperation. Depending on the specific area of concern, this cooperative effort may include both Federal and State authorities. The strategy also refers to the use of reconnaissance assets, ships, and land units “all linked by an operational information network.”²²

Chapter 18 allows the military to monitor the movements of ships and aircraft *outside* the US and to communicate that information to law enforcement. Although the sensors are not specified, it is reasonable to assume radar assets are generally envisioned.

However, it may also be possible to incorporate other military assets, such as imagery satellites, into this monitoring effort. This possibility has been investigated by DHS.

After 9/11, DHS moved to expand its use of the National Applications Office (NAO). Originally established in 1974 as the Civil Applications Committee, the NAO was a initially a project designed to bring military satellite information to civilian agencies for use in events such as disaster relief and weather monitoring.²³ After 9/11 there was a desire to extend this to support of law enforcement. However, there are unresolved legal issues with this proposed expanded use,²⁴ to the extent that in June 2009 a member of Congress introduced a bill to stop funding for the NAO based on concerns it was in effect spying on US citizens.²⁵ The main argument was that use of imagery satellites against US citizens may constitute an illegal search under the 4th amendment.

A JTF commander assigned to monitor ship movements in international waters may not be able to use military imaging satellites for two reasons. First, prior to using such assets a JTF commander would need to ensure such imagery did not constitute a kind of 'technology enabled' search for the same reasons such activities are an issue for the NAO. That is, such activities, if deemed to be searches, are prohibited by a number of laws including the Constitution, the PCA and Chapter 18. Second, although Chapter 18 allows the military to monitor the movements of ships and aircraft outside the US in order to provide this information to law enforcement, DODD 5525.5 prohibits the military from conducting "pursuit or surveillance."²⁶ When drafting his guidance, a JTF commander is therefore forced to decide at what point monitoring ends and surveillance and pursuit begin. In deciding this and the question of a technology-enabled search, it is likely the JTF commander

will be advised to err on the side of caution. This is, of course, also erring on the side of our enemies.

Physically searching a ship, on the other hand, is a different problem that raises different legal issues. To begin with, if there is good reason to suspect a national security threat is presented by any vessel, the US Navy can board it in US or international waters under the right of national self-defense.²⁷ Under just about any other circumstance, however, the reason for boarding a vessel would be considered as law enforcement. This results in two new questions: can the vessel be legally boarded by a US agency, and can the Navy be that agency? To the first question, a state has authority to board all vessels within its territorial waters. In the US, this authority is reserved to the USCG. Generally speaking, in international waters only the flag state, defined as that country in which the vessel is legally registered, can authorize boarding.²⁸ Thus, under international law the US Navy has this authority over registered US vessels. Whether US or not, once authorization is obtained, the next question is whether or not the military is restricted outside the US by the PCA or other US laws. In at least some cases, the Justice Department has determined that the PCA does not apply outside the US.²⁹ However, under Chapter 18, any vessel, anywhere, suspected of violating anti-terrorism or counter-drug laws cannot be stopped or boarded by the US Navy unless a LEDET is present.

Leaving aside the question of boarding and searching a vessel, if such an event has taken place and wrong-doers are present, the question now turns to their arrest. This is problematic since the military has no inherent Federal arrest authority.³⁰ This was one reason for establishing LEDETs in the first place. Certainly the military has the physical ability to detain people, but arrest authority would have to stem from nothing more than a kind of

citizens arrest if a LEDET was not present. A JTF commander faced with such a dilemma, in planning or in practice, may be faced with letting a suspect go or possibly violating the law. It is quite possible that without a clear threat a suspect would be released.

The pursuit of maritime security is complicated by many issues. The largest number of questions are related to the geographic extent of various US laws and DoD policies. Another is the fact the PCA prohibits the Navy from boarding a vessel in US waters. This can be effectively solved by the presence of USCG forces or personnel, but a disturbing gap is formed if only the Navy is present. Finally, there is the matter of arrest authority. Since the military does not hold such authority, a JTF commander would find herself on shaky legal ground if she authorized an arrest during an operation.

Perspective: Past Events

The fact that there have been no convictions under the PCA³¹ could lead some to conclude the law is longer relevant. But a lack of convictions does not mean the PCA has not affected military decisions. On the contrary, the military is periodically forced to confront the PCA, and not all of the decisions have been good ones.

- Los Angeles, CA, 1992.³² In late April 1992 a jury acquitted police officers in the beating of Rodney King. The subsequent rioting that broke out in the city quickly exceeded the capabilities of local law enforcement. The Mayor called the Governor, who mobilized California National Guard units. The Guard moved into LA and, amongst other things, set up a call center to respond to requests for law enforcement. At the same time, uncertain that the Guard would be enough, the Governor sought additional assistance from the Federal government. As required by the Insurrection Act, President Bush issued a proclamation to disperse prior to sending in Federal forces. Later, after JTF units took command of the

situation in LA, requests for law enforcement assistance were denied. Although the overall impact of this change cannot be known with certainty, it is likely the toll in human life and property was higher because the military decided not to take up law enforcement.

The decision against law enforcement came from the JTF commander, who was apparently confused about the interaction of the Insurrection Act and the PCA.³³ Sent in under the Insurrection Act, one of the exceptions to the PCA, the JTF in fact had full authority to conduct law enforcement.

- New Orleans, LA, 2005. In August 2005 Hurricane Katrina struck New Orleans, resulting in the largest loss of life due to a natural disaster in recent American history. Two days before the storm struck, President Bush had declared portions of the Gulf Coast disaster areas as part of the requirements for rendering Federal aid under the Stafford Act.³⁴ Shortly after the storm, military units were in New Orleans helping with disaster assistance. There was some bewilderment when looting took place within sight of Federal troops who were observed to be taking no action to stop it.

In this case the civilian population was confused that US military troops were not involved in law enforcement even though there was a discernible need for it. The troops, however, were present under the authority found in the Stafford Act, which does not include law enforcement. The JTF commander was not confused at all about his law enforcement role—he did not have one. Those military personnel seen enforcing the law were in fact National Guard units from Louisiana and Mississippi.³⁵

- Fort Rucker, AL, 2009.³⁶ In March 2009 a gunman in Alabama went on a shooting spree and killed 10 people including himself. The crime scenes ranged all over Geneva County, and the sheriff found he had too few men to secure all of them. The local sheriff had

signed a Memorandum of Understanding with the local Army post two years before. This memorandum spelled out the basics of mutual support between the two organizations, including promised assistance in certain emergencies.³⁷ Faced with a number of crime scenes spread out over many miles, the sheriff asked for military police(MP) assistance from the post. The commander responded with 25 MPs. Later that night, those same troops were photographed patrolling the streets of a nearby town.

This case highlights the gray area of the definition of law enforcement as well as poor knowledge of the law. To the former, while MPs standing around a house (crime scene) may not be compelling any behavior as law enforcement officers, it is not so reasonable or easy to say armed MPs on the streets are not have a compelling effect. To the latter, in this case the commander incorrectly asserted the use of these troops was authorized using the Immediate Response Authority.³⁸ However, as both the commander and his lawyer should have known, this authority assumes that action is needed to prevent *imminent* loss of life, prevention of human suffering or significant property damage.³⁹

Some view this as an isolated event; a so called 'one off' that cannot be totally prevented. But while this event was minor, such minor events are far more likely to occur than major events like natural disasters or riots. With the speed of modern media even small events can greatly impact public opinion, and public confidence in the military rests in part on the military not misusing its authority.

Perspective: A Possible Future

On 28 June 2013, a container ship was reported as missing in the eastern Pacific Ocean several hundred miles west of California. US Navy aircraft involved in exercises in the area spotted the ship, investigated, and reported it was apparently under control but

unresponsive to queries. The ship was of US registry and was not broadcasting an Automatic Identification System signal. After briefly considering boarding the vessel to investigate, the Strike Group Commander in charge of the exercise decided against such action on the recommendation of the Staff Judge Advocate (SJA) and his own understanding of the law. The location, course, speed and heading of the ship were sent to the USCG in Los Angeles. The USCG monitored for the ship, but since they had no assets to search that far to sea, contact was soon lost.

On 3 July the suspect container ship was used as a kinetic energy weapon against a deep draft oil terminal near Los Angeles. The attack resulted in closure of the terminal and a spill of two million gallons of oil. On 4 July NORTHCOM established JTF EASTPAC. The same 3rd Fleet forces exercising west of California were provided to NORTHCOM to form the JTF. Tasking to the JTF commander included: conducting broad ocean surveillance using all assets available, coordinating with DHS to integrate all locating data to form a common operating picture, and, conducting searches of suspect ships consistent with international law.

Not unexpectedly, the decision not to board the suspect vessel on 28 June was questioned. As the flag state, the US Navy had authority to board the vessel.⁴⁰ However, since there was no clear case for national security, boarding the vessel was deemed a law enforcement action. With no LEDET present, the commander and the SJA determined they did not have authority to conduct the boarding under DODD 5525.5, Chapter 18 and probably the PCA.

The next question raised was why the military did not follow the vessel until the USCG could intercept it. The commander stated that the vessel was monitored while it was in range of available assets (ships and aircraft) as allowed by Chapter 18 and DODD 5525.5.

However, once the monitoring effort became dedicated to a specific vessel it constituted pursuit, and as such was prohibited by DODD 5525.5. In this case the commander was correct, but only because the DODD goes beyond the letter of the law. Chapter 18 gives the military authority to intercept vessels and aircraft, outside the US, for purposes of communicating and directing them to a specific location within the US.⁴¹ Conducting this kind of intercept activity might indeed constitute pursuit, but it is authorized. The language of the DODD effectively removes this authority.⁴²

What of the tasking after 3 July and the stand up of the JTF? For an unspecified but finite amount of time after the attack, the US could certainly assert self-defense and board nearly any vessel deemed suspicious. However, after this finite time expired, boardings would once again be viewed as strictly law enforcement and subject to flag state approval. While this problem could be partly solved with the presence of a LEDET, in scenarios like this the USCG may not have enough personnel available to cover the much larger number of Navy ships that may be used for such activities. Finally, the tasking for broad ocean surveillance was discussed previously with maritime security. To recap that discussion, a JTF commander may be precluded from using some sensors in his mission if their use could constitute a search. Similar concerns would bar the JTF commander from providing such information to law enforcement.

Conclusions

The laws governing the use of the military in a law enforcement role are deceptively simple in wording yet complex in interpretation and application. DoD has sometimes chosen to interpret the laws even more restrictively, removing authority and limiting options in ways

that were not part of the original law. After reviewing the laws, policies, their interactions and some real world and possible scenarios, a few conclusions can be reached.

First, the PCA and associated laws accurately reflect the opinion of the typical American when it comes to the use of the military in law enforcement. Reactions in New Orleans and Fort Rucker are good examples of this. Yet another was the reaction to the 2007 modifications to the Insurrection Act that essentially gave the President nearly unlimited authority to use the military domestically.⁴³ Opposition to this change was so universal that both liberals and conservatives found themselves on the same side of the issue and the changes were reversed the next year.^{44,45} Any proposed changes or improvements to the law should not attempt to use the military domestically in a way that is outside these normative bounds.

Second, the language of the PCA is imprecise and subject to more interpretation than should be necessary. The geographic scope of the law and the activities proscribed are not defined, and they may have been applied by DoD more broadly than originally intended. An at sea JTF commander would be better served by a law that attempted to define what kinds of activities were permitted both outside and inside the geographic bounds of the US.

Third, DoD implementation of the PCA and Chapter 18 is overly broad and unnecessarily restricts freedom of action of military commanders. By applying the language of Chapter 18, in part to define the scope of the PCA, to the entire military worldwide, DoD has prevented the Navy from exercising law enforcement authority in otherwise legitimate circumstances and locations where there is no other law enforcement presence—at sea. The overall effect of the laws and their implementation is the creation of legal gaps in our defense in depth of the homeland.

Recommendations

First, the PCA should be revised to make its scope and intent more transparent. In part because the meaning of the current law is so unclear, DoD took action to ensure military commanders erred on the side of caution. This limits the operational commander's efforts in support of homeland security by limiting the scope of his authority at sea, where there is quite possibly no other authority. Improving the clarity of the law will improve execution by reducing dependence on precedent and interpretation, and by allowing an at sea JTF commander to add some law enforcement activities to the tool kit used to push the fight further from US shores. A revised PCA should attempt to clearly state where and when the law applies, what branches of the military are affected, and what kinds of actions are prohibited.⁴⁶

Second, once the geographic boundaries of the PCA are defined, the military should be provided with clear search and arrest authority outside those boundaries. Such a change adds certainty and confidence and improves JTF freedom of action outside the US. It may also serve to improve support to law enforcement with broad area surveillance by disconnecting the possible legal and technical linkage that exists between surveillance and search.

Taken together, these first two actions close a number of gaps that exist in law and policy at this time. Giving the military the authority to fully enforce the law outside the US would improve security without compromising American freedoms at home.

Third, DODD 5525.5 should be reviewed and revised to be in keeping with the letter of the law. In its current form this directive prevents JTF commanders from conducting a number of activities that would otherwise be allowed under US and international law. The

additional DoD restrictions may serve to protect the commanders, but not the safety and liberties of the Americans the commander is there to protect. Better training for Joint Force commanders is preferable to limiting the use of the forces assigned to them.

Fourth, as the military command most likely to be seen by the public, NORTHCOM must take the lead in addressing any PCA related questions. NORTHCOM executed just such a strategic communications plan in addressing possible public concerns when an Army brigade was 'deployed' to NORTHCOM in 2008.⁴⁷ Any proposed changes to the PCA are likely to be challenged regardless of how they are worded, and the continued concerns over simply assigning forces to NORTHCOM⁴⁸ indicates public scrutiny of any perceived increases in the military role in law enforcement should be expected.

The PCA and the other laws related to domestic use of the military are important to the way Americans view themselves and the role of their military. The American public does not want to see its military enforcing the law at home. Such thoughts conjure up images of the Soviet Union, secret police forces and military dictatorships. While those are futures to be avoided, the current security environment demands changes to law and policy so that security needs can be met without undermining American rights. Until such changes are made, NORTHCOM will be hampered in its homeland security role.

Notes.

1. U.S. Northern Command, "About USNORTHCOM," <http://www.northcom.mil/About/index.html> (accessed 14 October 2009).
2. The term 'military', as used in this paper, includes the Army, Navy, Air Force, Marine Corps and the National Guard when called to federal service. It does not include the National Guard when used by state level authorities nor does it include the US Coast Guard. Except where otherwise identified, the various federal statutes of concern in this paper do not apply to the National Guard (in state service) or the US Coast Guard.
3. Any reference to a JTF in this paper refers to one under NORTHCOM since it is the DoD link to law enforcement.
4. U.S. Constitution. Article II, Section 2, Clause 1, <http://www.usconstitution.net/const.html>, (accessed 01 September 2009).
5. Ibid, Article I, Section 8, Clause 15.
6. *Encyclopedia Americana*, Vol.15, s.v. "Insurrection Act, The"
7. "Enforcement of the Laws to Restore Public Order." *Code of Federal Regulations*, title 10, secs. 331-335 (2008).
8. *Encyclopedia Americana*, Vol.15, s.v. "Insurrection Act, The"
9. Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done," *Military Law Review* 175 (March 2003): 97-104.
10. James E Sefton, *The United States Army and Reconstruction* (Baton Rouge, LA: Greenwood Press, 1967), 2-69.
11. Wikipedia, "Posse Comitatus Act," http://en.wikipedia.org/wiki/Posse_Comitatus_Act, (accessed 19 October 2009).
12. "Use of Army and Air Force as Posse Comitatus," *Code of Federal Regulations*, title 18, sec. 1385 (1947).
13. Perhaps because the Navy was not pressed into the service of law enforcement throughout the South, the restrictions on the Navy never made it into the law. See Gary Felicetti and John Luce, "The Posse Comitatus Act: Liberation from the Lawyers," *Parameters* 34 (Autumn 2004): 100.
14. Felicetti and Luce (2003), 88-93.

15. "Military Support for Civilian Law Enforcement Agencies," *Code of Federal Regulations*, Title 10, secs. 371-382 (2008).
16. Department of Defense, *Military Assistance for Civil Disturbances* (MACDIS), Department of Defense Directive (DODD) 3025.12, Washington, DC: DoD, 4 February 1994.
17. Department of Defense, *DoD Cooperation with Civilian Law Enforcement Officials*, DODD 5525.5, Washington, DC: DoD, 20 December 1989.
18. *Ibid.*, Appendix E.
19. *Ibid.*, para 8.1.
20. Felicetti and Luce (2004), 103.
21. DODD 5525.5, Appendix E, section 4.1.3.
22. U.S. President, *The National Strategy for Maritime Security*, Washington, DC: White House, 2005.
23. Department of Homeland Security, *Fact Sheet: National Applications Office*, 15 August 2007. http://www.dhs.gov/xnews/releases/pr_1187188414685.shtm (accessed 30 September 2009)
24. A 2008 GAO reported stated "DHS has not resolved legal and policy issues associated with NAO support for law enforcement." See U.S. Government Accountability Office, *National Applications Office Certification Review*, Washington, DC: GAO, 2008. <http://www.gao.gov/new.items/d09105r.pdf> (accessed 18 September 2009).
25. House. *A Bill to prohibit the Secretary of Homeland Security from obligating or expending funds for the National Applications Office of the Department of Homeland Security*, " 111th Cong., 1st sess., 2009, HR 2703.
26. DODD 5525.5, Appendix E, section 4.1.3.
27. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication (NWP) 1-14M, July 2007, 4-4.
28. *Ibid.*, 3-4.
29. *Ibid.*, 3-13.
30. Felicetti and Luce (2003), 167.

31. Felicetti and Luce (2004), 105.
32. Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective*, Fort Leavenworth, KA: Combat Studies Institute Press, 2006: 47-49.
33. Ibid., 52.
34. The Stafford Act provides for Federal assistance in disaster relief efforts, and it allows the President to use all Federal agencies in such efforts. Similar to the Insurrection Acts, part of the process includes a state request for Federal assistance. Additionally, the military can be used under this statute without referring to the PCA or the Insurrection Acts provided such use does not involve law enforcement. Historically, use of the military under the Stafford Act has been accompanied by the use of the National Guard for law enforcement until local police could take over. See "Disaster Relief," *Code of Federal Regulations*, title 42, chap. 68 (2008).
35. Mary Bradley, "The Posse Comitatus Act: Does It Impact the Department of Defense During Consequence Management Operations," *The Army Lawyer* (October 2007): 68-75.
36. Gina Cavallaro, "Soldiers help reviewed after Ala. Shootings." *Army Times* (29 March 2009). http://www.armytimes.com/news/2009/03/army_rucker_032809w (accessed 28 August 2009)
37. Memos of this nature are commonplace. The records of this event, including the memo, can be found online via FOIA request for Ft. Rucker Records at: <http://www.theblackvault.com/documents/alabamamassmurder.pdf> (accessed 28 August 2009).
38. Mary Bradley, "They Asked, But Can We Help? A Judge Advocate's Guide to Immediate Response Authority," *The Army Lawyer*, (February 2007), 20-34.
39. Department of Defense, *Military Support to Civil Authorities* (MSCA). DODD 3025.1. Washington, DC: DoD, 15 January 1993.
40. NWP 1-14M, 4-7.
41. "Military Support for Civilian Law Enforcement Agencies," Title 10, sec 374 (2008).
42. DODD 5525.5, Appendix E, section 4.1.3.
43. House. *John Warner National Defense Authorization Act for Fiscal Year 2007*, 109th Cong., 2nd sess., 2006, H.R. 5122, sec 1076.
44. Editorial, "Congress Reverses Posse Comitatus Act Changes," *New American*, 12 May 2008.

45. House. *National Defense Authorization Act for Fiscal Year 2008*, 110th Cong., 2nd sess., 2007, H.R. 4986, sec 1068.

46. One recommended revision to the PCA is as follows:

“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,

- (1) intentionally and with a bad purpose to either disobey or disregard the law
- (2) uses any part of the Army or Air Force
- (3) within the United States
- (4) upon the demand of, and in subordination to, the sheriff, U.S. marshal, or other law enforcement official
- (5) to directly enforce civilian law in a way that U.S. citizens are subject to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, or at a polling place

(6) without first obtaining permission of the President to do so shall be fined under this title or imprisoned not more than two years, or both.”

See Felicetti and Luce (2003), 164.

47. Amy Goodman, “Is Posse Comitatus Dead?” *Alternet*, 8 October 2008, http://www.alternet.org/rights/102220/is_posse_comitatus_dead (accessed 28 August 2009).

48. Erin Rosa, “Elite Combat Brigade for Homeland Security Missions Raises Ire of ACLU,” *Colorado Independent*, 2 November 2008.

<http://coloradoindependent.com/13321/elite-combat-brigade-for-homeland-security-missions-raises-ire-of-aclu> (accessed 28 August 2009)

BIBLIOGRAPHY

- Best, Richard, and Jennifer Elsea. *Satellite Surveillance: Domestic Issues*. Washington, DC: Congressional Research Service, 2008.
- Bradley, Mary. "They Asked, But Can We Help? A Judge Advocate's Guide to Immediate Response Authority." *The Army Lawyer* (February 2007): 20-34.
- Cavallaro, Gina. "Soldiers help reviewed after Ala. Shootings." *Army Times* (29 March 2009). http://www.armytimes.com/news/2009/03/army_rucker_032809w (accessed 28 August 2009)
- Clark, George. "Posse Comitatus Act: A Misunderstood Law in Need of Change." Research Paper, Maxwell AFB, AL: Air University, 2006.
- Colon, Frank. "Does the Posse Comitatus Act create a seam of vulnerability in our territorial waters hindering U.S. Northern Command's mission." Research Paper, Newport, RI: Naval War College, 2006.
- Dalton, Jane. "The United States National Security Strategy: Yesterday, Today, and Tomorrow." *Naval Law Review* 52 (January 2005): 60-97.
- "Disaster Relief." *Code of Federal Regulations*, title 42, chap. 68, 2008.
- Doyle, Charles. *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*. Washington, DC: Congressional Research Service, 2000.
- Dunlap, Charles J, Jr. "The Origins of the American Military Coup of 2012." *Parameters* 22 (Winter 1992-3): 2-20.
- Elsea, Jennifer. *The Posse Comitatus Act & Related Matters: A Sketch*. Washington, DC: Congressional Research Service, 2005.
- "Enforcement of the Laws to Restore Public Order." *Code of Federal Regulations*, title 10, secs. 331-335, 2008.
- Felicetti, Gary, and John Luce. "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done." *Military Law Review* 175 (March 2003): 86-182.
- Felicetti, Gary, and John Luce. "The Posse Comitatus Act: Liberation from the Lawyers." *Parameters* 34 (Autumn 2004): 94-107.

FOIA request for Ft. Rucker Records.

<http://www.theblackvault.com/documents/alabamamassmurder.pdf>
(accessed 28 August 2009).

Freedburg, Sydney. “*Little law has big impact on use of military at home.*” National Journal. November 15, 2005.

Geiger, Deborah. “Posse Comitatus, the Army, and Homeland Security: What is the Proper Balance?” Research Paper, Carlisle Barracks, PA: Army War College, Joint Military Operations Department, 2006.

Goodman, Amy. “Is Posse Comitatus Dead?” Altnet, 8 October 2008.
http://www.altnet.org/rights/102220/is_posse_comitatus_dead
(accessed 28 August 2009)

Harvey, James. “Not in Our Own Backyard: Posse Comitatus and the Challenge of Government Reorganization.” Research Paper, Maxwell AFB, AL: Air University, 2007.

Lewis, Neil. “Memos Reveal Scope of Power Bush Sought in Fighting Terror.” *New York Times*. 03 March 2009. <http://www.nytimes.com/2009/03/03/us/politics/03legal.html>
(accessed 06 September 2009).

Matthews, Matt. *The Posse Comitatus Act and the United States Army: A Historical Perspective*. Fort Leavenworth, KA: Combat Studies Institute Press, 2006.

“Military Support for Civilian Law Enforcement Agencies.” *Code of Federal Regulations*, Title 10, secs. 371-382 (2008).

New American, “Congress Reverses Posse Comitatus Act Changes,” 12 May 2008.

Pine, Art. “Should Congress Scrap Posse Comitatus?” *U.S. Naval Institute Proceedings* 131 (December 2005): 46-48.

Rosa, Erin. “Elite Combat Brigade for Homeland Security Missions Raises Ire of ACLU.” *Colorado Independent*, 2 November 2008.
<http://coloradoindependent.com/13321/elite-combat-brigade-for-homeland-security-missions-raises-ire-of-aclu> (accessed 28 August 2009)

Sefton, James E. *The United States Army and Reconstruction*. (Baton Rouge, LA: Greenwood Press, 1967), 2-69.

“The Military is Not the Police.” *New York Times*. 30 July 2009.
<http://www.nytimes.com/2009/07/30/opinion/30thu1.html>
(accessed 05 September 2009).

- Thachuk, Kimberley L., and Tangredi, Sam J. "Transnational Threats and Maritime Responses." In *Globalization and Maritime Power*, edited by Sam Tangredi. (Washington, DC: National Defense University, December 2002), 57-86.
- Trebilcock, Craig. "Resurrecting Posse Comitatus in the Post-9/11 World." *Army* 59 (May 2009): 21-4.
- "United Nations Convention on the Law of the Sea." 10 December 1982, p53-61. Articles 108 and 94.
- U.S. Congress. House. *National Defense Authorization Act for Fiscal Year 2008*. 110th Cong., 2nd sess., 2007. H.R. 4986.
- U.S. Congress. House. *John Warner National Defense Authorization Act for Fiscal Year 2007*. 109th Cong., 2nd sess., 2006. H.R. 5122.
- U.S. Constitution. <http://www.usconstitution.net/const.html>, (accessed 01 September 2009).
- U.S. Department of Defense. *Military Assistance for Civil Disturbances* (MACDIS). Department of Defense Directive (DODD) 3025.12. Washington, DC: DoD, 4 February 1994.
- U.S. Department of Defense. *Military Assistance to Civil Authorities*.(MACA). DODD 3025.15. Washington, DC: DoD, 18 February 1997.
- U.S. Department of Defense. *DoD Cooperation with Civilian Law Enforcement Officials*. DODD 5525.5. Washington, DC: DoD, 20 December 1989.
- U.S. Department of Defense. *Military Support to Civil Authorities* (MSCA). DODD 3025.1. Washington, DC: DoD, 15 January 1993.
- U.S. Department of Homeland Security. *Fact Sheet: National Applications Office*. 15 August 2007. http://www.dhs.gov/xnews/releases/pr_1187188414685.shtm (accessed 30 September 2009)
- U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication (NWP) 1-14M, July 2007.
- U.S. General Accounting Office. *Homeland Defense: Preliminary Observations on How Overseas and Domestic Missions Impact DOD Forces*. Washington, DC: GAO, 2003.
- U.S. General Accounting Office. *Homeland Defense: DoD Needs to Assess the Structure of U.S. Forces for Domestic Military Missions*. Washington, DC: GAO, 2003.

U.S. Government Accountability Office. *National Applications Office Certification Review*. Washington, DC: GAO, 2008.
<http://www.gao.gov/new.items/d09105r.pdf> (accessed 18 September 2009)

U.S. President. The National Strategy for Maritime Security. Washington, DC: White House, 2005.

“Use of Army and Air Force as Posse Comitatus.” *Code of Federal Regulations*, title 18, sec. 1385, 1947.

Young, Stephen. “*The Posse Comitatus Act of 1878: A Documentary History*.” William S. Hein & Co. Buffalo, N.Y., 2003.